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Extraterritoriality and its Limits: The Iran and Libya Sanctions Act of 1996

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> *"Simply put, a foreign corporation or person will have to choose between the United States or Iran." Senator Alfonse D'Amato, March 27, 1995.*[1]

Introduction

In August 1996, President Clinton signed the Iran-Libya Sanctions Act, promising to apply trade sanctions against foreign corporations with significant investments in certain Libyan and Iranian industries.[2] Aimed at deterring those nations' abilities to develop biological or nuclear weapons and assist terrorist groups, the statute complements the existing restrictions on American investments in their economies. Although the statute has received relatively little attention, coming as it did in the wake of the more controversial Helms-Burton legislation, it contains a dramatic departure from traditional trade controls. The Act's sanctions strategy against foreign corporations provides for the most radical extension of extraterritorial jurisdiction yet attempted by Congress.

The Iran and Libya Sanctions Act has not yet been enforced, and it might never be; perhaps Congress intended it only to signal opposition to European trade with pariah states. Nonetheless, the statute raises serious questions of the extent of extraterritorial jurisdiction and the interpretation of national security clauses of international trade agreements.

This Note examines the validity of the Iran and Libya Sanctions Act of 1996 (the Act) both under principles of customary international law and under existing obligations arising from the General Agreement on Tariffs and Trade. In doing so, it examines the legal history of U.S. attempts to legislate extraterritorially to enforce foreign policy goals, with particular

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1. S. REP. NO. 104-187, at 5 (1995).

2. John M. Broder & Mary W. Walsh, *Clinton Signs Bill Aimed at Foreign Firms in Libya, Iran*, L.A. TIMES, Aug. 6, 1996, *available in* 1996 WL 11256064.

emphasis on the *Freuhauf* case from the mid-1960s, the Soviet pipeline case from the early 1980s, and the immediate predecessor of the Act, the 1996 Helms-Burton legislation.

Like the Helms-Burton statute, the Act threatens secondary boycotts against foreign corporations that enter certain contracts with Iran or Libya. While a primary boycott is aimed at an offending entity or state, a secondary boycott is directed against third parties. European and other states permit their corporations to deal with Iran and, to a lesser extent, Libya, and the Act seeks to curtail such trade.

Whether the Act is acceptable under international law relates to the scope of these extraterritorial provisions. Extraterritorial legislation is that which seeks to bind persons beyond a state's borders to its laws. Although extraterritoriality is recognized in some limited contexts, its use to enforce foreign policy has always been highly controversial. The Iran and Libya Sanctions Act of 1996 seeks to punish wholly foreign firms for acts legal in their own countries without any claimed effect on American-owned property. In that respect, it calls for a further extension of extraterritorial legislation than the United States has ever attempted.

Under the Restatement (Third) of Foreign Relations Law (the Restatement), a state must have "jurisdiction to prescribe" in order to subject those beyond its borders to its laws.[3] Such jurisdiction may exist where extraterritorial acts have a "substantial" effect within the nation at issue;[4] it must also, however, be "reasonable."[5] In the alternative, a state may exercise extraterritorial jurisdiction to "punish" acts of terrorism.[6] This Note argues that the Act meets none of these conditions because its principal effects are on third party states rather than sponsors of terrorism and because the only substantial effect of European trade with Iran and Libya on the United States is the loss of business by American firms sidelined by current trade policy.

Similarly, existing American trade obligations under the General Agreement on Tariffs and Trade place a realistic limit on the application of sanctions against foreign firms. Significant import barriers may not be imposed under the Most Favored Nation status conferred upon most trading partners of the United States.[7] Moreover, although Article XXI of the

3. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) [hereinafter "THE RESTATEMENT"].

4. *Id.*

5. *Id.* at § 403.

6. *Id.* at § 404.

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 187 (GATT), Art. I. The GATT was renegotiated and included as An-

treaty provides exceptions for national security,[8] the sanctions envisioned by the Act do not fall under the previously established definition of that concept. Thus, standing GATT obligations greatly reduce the likelihood that the U.S. government could successfully impose the Act.

Finally, political considerations also weigh against application of the Act to foreign corporations. This is true because the United States may only damage its trade relations with European allies; because such application might result not in the image of a West unified against the governments of Iran and Libya, but at best a fragile coalition with no agreed upon approach to terrorist proxies; and because preventing states of the former Soviet Union from investing in nearby Iran may push them into further economic and political dependence on Russia or destabilize nations just now experimenting with market economies. It may well be best if President Clinton suspends operation of the Act without applying sanctions, as he did in January 1997 with key extraterritorial sections of the Helms-Burton legislation.[9]

I. The Iran and Libya Sanctions Act of 1996

A. Background

As it stands today, federal law prohibits American businesses from engaging in any exports or imports to or from Libya[10] and Libyan-controlled entities.[11] In 1995, President Clinton significantly strengthened existing trade restrictions against imports from Iran[12] and banned exports to and investments in Iran by U.S. businesses.[13] The underlying premise of

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nex 1A to the Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

8. GATT, art. XXI. Such exceptions involve nuclear materials, armaments, and wartime measures.

9. Steven Lee Myers, *One Key Element in Anti-Cuba Law Postponed Again*, N.Y. TIMES, Jan. 4, 1997, at A1.

10. 22 U.S.C.A. § 2349aa-8. The statute was passed under the Reagan administration's efforts against Libya in 1986.

11. Dept. of the Treasury Office of Foreign Assets Control, Libyan Sanctions Regulations; Specially Designated Nationals List, 60 Fed. Reg. 8300 (1995); Dept. of the Treasury, Office of Foreign Assets Control, Libyan Sanctions Regulations; Specially Designated Nationals List, 60 Fed. Reg. 37904 (1995); Dept. of the Treasury, Office of Foreign Assets Control, List of Blocked Persons and Specially Designated Nationals, 59 Fed. Reg. 59460 (1995).

12. President Reagan imposed import restrictions on Iran in 1987. *See* 52 Fed. Reg. 41940 (1987).

13. Exec. Order No. 12959, 60 Fed. Reg. 24757 (1995) (Prohibiting Certain Transactions with Respect to Iran); Exec. Order No. 12957, 60 Fed. Reg. 14615 (1995) (Pro-

the restrictions is that oil revenues allow Iran and Libya to sponsor groups seeking to derail the Arab-Israeli peace process and to develop nuclear weapons.[14]

The President acted in direct response to a plan by the American oil firm Conoco to oversee the development of two oil fields in Iran.[15] Conoco contracted with the Iranian government in early 1995 to develop the sites around Sirri Island in the Persian Gulf.[16] Two months later, President Clinton issued an executive order prohibiting foreign subsidiaries of American oil companies from buying Iranian oil exports,[17] which had accounted for a quarter of Iranian sales.[18] As a result of these restrictions, U.S. firms have watched as European and other corporations take over major development contracts with those states. For example, Total SA, a French firm, took over the lucrative Conoco project.[19] Similarly, many foreign oil companies are attempting to purchase the remaining ownership interests of American oil companies in Libya.[20]

Senator D'Amato introduced the bill in the Senate on March 27, 1995, stating that the law would force an economic choice between the United States and Iran or Libya.[21] In considering the bill, the Senate heard testimony that Iran's economy was facing a dire shortage of hard currency, and that it was purchasing four nuclear reactors from Russia.[22] The idea that foreign firms were benefiting at American expense may also have been a factor in the bill's passage, as the Senate Report on the Act states baldly, "Total S.A., a French company, wants to help Iran develop its oil resources. [The Act] would make it vastly more difficult for Total S.A. or other companies to do so."[23]

Although the bill passed without opposition, two congressmen expressed concern about the Act's possible ramifications. In a House Committee Report, they warned that the bill might prove "counterproductive" in that it would anger American trading partners and lead to counter-

hibiting Certain Transactions With Respect to the Development of Iranian Petroleum Resources).

14. H. REP. NO. 104-523, Part I, at 9-10 (1995).

15. *Id.* at 9.

16. *Id.*

17. Exec. Order No. 12959, *supra* note 13.

18. H. REP. NO. 104-523, Part I, at 10.

19. Eric Pianin, *Clinton Approves Sanctions for investors in Iran, Libya*, WASH. POST, Aug. 6, 1996, at A8, *available in* 1996 WL 10724877.

20. *Id.*

21. S. REP. NO. 104-187, at 5.

22. *Id.*

23. *Id.*

sanctions.[24] They feared that disputes with other states could actually decrease "multilateral cooperation" against Iran.[25] The congressmen also noted that trade sanctions could hurt American businesses; they voted, however, in committee to support the bill's "fundamental objective—changing Iranian government behavior."[26]

B. The Statute

The Iran and Libya Sanctions Act describes itself as

> [a]n Act to impose sanctions on persons making certain investments directly and significantly contributing to the enhancement of the ability of Iran or Libya to develop its petroleum resources, and on persons exporting certain items that enhance Libya's weapons or aviation capabilities or enhance Libya's ability to develop its petroleum resources, and for other purposes.[27]

Section 4, the first substantive section of the statute, outlines a requirement that the President initiate a "multilateral regime" with American trading allies and within the United Nations to apply sanctions against Iranian petroleum developments.[28] The President is to provide periodic reports to Congress regarding the status of this effort, and states agreeing to such a plan are not subject to the sanctions outlined in the later sections of the statute.[29]

Sections 5 and 6 contain the Act's extraterritorial provisions, although the statutory language is rather opaque. The sanctions are to be imposed against certain "persons;"[30] such entities can only be foreign corporations because of the already-existing restrictions on American investments.

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24. H. REP. No. 104-523, Part I, at 20 (Additional views of Lee H. Hamilton and James P. Moran).

25. *Id.*

26. *Id.* at 22.

27. The Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541, 50 U.S.C.A. §1701 (1996) [hereinafter "the Act"]. Although no sanctions were threatened in the first months after the Act's passage, in January 1997 the State Department published a list of eleven Iranian oil and gas projects "which have been publicly tendered," without naming which foreign firms contributed to their development. *See* Dep't of State Pub. Notice No. 2501, Significant Projects Which Have Been Tendered in the Oil and Gas Sector in Iran, 62 Fed. Reg. 1141 (1997).

28. The Act, § 4(a).

29. *Id.*, § 4(b)-(c).

30. The Act defines "person" as any natural person or commercial enterprise. *Id.*, § 14(14).

The Act sets forth different categories of sanctionable activities for investments in Iran and Libya. First, it seeks to "deny Iran the financial means to sustain its nuclear, chemical, biological, and missile weapons programs," as well as its promotion of "international terrorism."[31] Any foreign corporation or governmental body which knowingly makes a single or aggregate investment totaling more than forty million dollars within a twelve month period "that directly and significantly contributed to the enhancement of Iran's ability to develop petroleum resources of Iran" may be subject to sanctions.[32]

The Act's second objective is to force Libyan compliance with United Nations resolutions on chemical weapons and to prevent its development of "weapons of mass destruction."[33] Any foreign corporation or governmental body that provides Libya "any goods services, technology, or other items prohibited by UN Resolutions 748/ 883[34]" which allow it to develop or maintain its military, petroleum, and aviation industries, including nuclear, chemical, and biological weapons becomes subject to "mandatory" sanctions under the Act.[35]

"Investment" under the Act means three categories of interest in Iranian or Libyan oil industries. First, it includes buying shares in a public or private Libyan or Iranian development of "petroleum resources."[36] It also includes entering a contract to take direct or supervisory responsibility for such development or contracting for "royalties, earnings, or profits" from such development.[37] Contracts for "goods, services, or technology," however, do not fall under the Act's definition of investment.[38]

Entities engaging in such investments can be sanctioned in six ways; a violation of the Act calls for at least two of these to be applied. First, the Export-Import Bank of the United States may refuse to approve a guarantee, insurance, or credit extension "in connection with the export of any

31. *Id.*

32. *Id.*, § 5.

33. *Id.*

34. United Nations Security Council Regulations 748 and 883 imposed sanctions against Libya for its role in terrorist attacks on French and American airliners. *See* U.N. SCOR Res. 748 (1992); U.N. SCOR Res. 883 (1993). *See also* U.N. SCOR Res. 731 (1992).

35. *Id.*

36. Department of State Notice, Additional Information for the Iran and Libya Sanctions Act, 61 Fed. Reg. 66067-01 (1996).

37. *Id.*

38. *Id.* This means that one could sell Iran or Libya equipment or training for use in their oil industries without risk of sanction, as long as that party does not take a more direct managerial or financial role in developing those industries.

goods or services" to the business or government body.[39] Second, the United States may refuse to permit exports of goods or technology to that entity. Third, the government may "prohibit any United States financial institution" from providing loans or credit of more than ten million dollars in a twelve month period.[40] Fourth, if a "financial institution" violates the statute, the government may refuse to allow that institution to act as a primary dealer in U.S. debt instruments, become an agent of the U.S. government, or act as a repository for its funds.[41] Fifth, the United States may refuse to allow the entity to contract with it for goods and services.[42] Finally, the President can "restrict imports" to a sanctioned party under the International Emergency Economic Powers Act.[43]

The sanctions may be waived by the President should the United States have an overriding national security, informational, humanitarian, or "production" interest in the goods, services, or technology it needs from the party in violation of the Act.[44]

II. The International Response[45]

A. *The European Union's Reaction*

1. *Events Leading Up to the April 1997 Agreement*

European Union states reacted angrily to President Clinton's signing of the Act, but as of yet have responded only with a "clawback" regulation. Even before the bill was signed, the EU announced its opposition to the Act's extraterritorial provisions.[46] In making its formal complaint to the United States at the Act's passage, the EU declared that it would legally challenge any sanctions issued in its name.[47] The fifteen-nation group's planned retaliatory counter-sanctions, however, were blocked by Denmark's opposition, which argued that such sanctions would be unconstitu-

39. The Act, § 6.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* The International Emergency Economic Powers Act gives the President broad discretion in confronting "threats" to "national security." 50 U.S.C. § 1701.

44. The Act, § 5(f).

45. This Note reflects events before January 1, 1998.

46. AP-Dow Jones News Service, *EU Criticizes U.S. Action on Libya, Iran Arms Deals*, WALL ST. J. EUR., June 21, 1996, *available in* 1996 WL-WSJE 10745930.

47. Agence France-Presse, Aug. 8, 1996, *available in* 1996 WL 3903586.

tional under its laws.[48] France vowed to draft its own legislation to protect its corporations from U.S. sanctions,[49] and Germany also strongly criticized the new law.[50] At its December 1996 summit, the EU stated that it supported U.S. values but opposed the use of "unilateral action at the expense of close partners with shared values."[51]

The EU's first formal response was a "blocking regulation" aimed mainly at the Helms-Burton legislation but including the Act in its scope.[52] That enactment, binding on the fifteen EU states, has four components. It establishes an obligation not to comply with the Act, neutralizes the Act's effect, "allows companies to claim foreign compulsion if sued in U.S. courts," and has a "clawback" provision providing for recovery of damages and legal costs in European courts.[53]

The European Union's second response was to call for a World Trade Organization panel to rule on the legality of the Act in February 1997.[54] In April 1997, however, the EU suspended its WTO action because the United States agreed to implement the Act "in a deliberate and fair manner" by working to grant EU companies waivers.[55] The EU also stated that it would resume its WTO panel claim should such waivers be denied or withdrawn.[56]

The EU states have reason to fear U.S. trade sanctions under the Act. Twenty percent of its oil is imported from Iran and Libya, with Italy im-

48. John Palmer, *Danes to Block EU Action*, THE GUARDIAN (UK), Oct. 23, 1996, at 11, *available in* 1996 WL 13383010.

49. *France Drafts Legislation to Defy New U.S. Sanctions*, WALL ST. J. EUR., Aug. 29, 1996, *available in* 1996 WL-WSJE 107749744.

50. Roger Boyes & Michael Theodoulou, *Bonn Heads Allied Resistance to US 'Terrorism' Sanctions*, THE TIMES (LONDON), Aug. 7, 1996, *available in* 1996 WL 6511468.

51. *EU Summit: Main Points of Foreign and Trade Issues*, AFX NEWS, Dec. 16, 1996, *available in* WL Database EURONEWS.

52. European Union: Council Regulation (EC) No. 2271/96, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted By a Third Country, Nov. 22, 1996, 36 ILM 125 (1997); Bernd Langeheime, The Legality of Helms-Burton Under the GATT and Public International Law, Address at the *Hastings International & Comparative Law Review* Symposium "The Helms-Burton Act: Domestic Initiatives & Foreign Responses" (Jan. 25, 1997). Mr. Langeheime is Trade Counselor for the European Union's Delegation of the European Commission to the United States.

53. *Id.*

54. Tom Buerkle, *A Stay in EU-U.S. Trade Spat*, INT'L HERALD TRIB., Feb. 13, 1997, at 12.

55. European Union-United States, Memorandum Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, Apr. 11, 1997, 36 I.L.M. 529 (1997) [hereinafter "EU Understanding"].

56. *Id.*

porting almost half its oil from those states.[57] In fact, the Italian state-run oil company Ente Nazionale Idrocarburi signed a three billion dollar oil investment deal with Libya in June 1996, while making no public announcement of the deal because the Act was passing through the U.S. Congress at that time.[58] British exports to Iran increased by fifteen percent in 1995, to £332 million.[59] Spanish, Austrian, German, and other European companies have significant interests in Iran and Libya;[60] although the statute refers only to new investments, any future investments could result in sanctions.

2. The Total Contract and the Possibility of Sanctions

Despite the April 1997 agreement and its six-month cooling off period, a multistate deal to develop Iranian oil fields touched off the first threat of sanctions under the Act. In September 1997, Total SA, the French company which took over Conoco's Iranian deal and likely instigated the Act's passage, announced that it would proceed with the project.[61] Total's partners in the deal are the Russian company Gazprom and the Malaysian company Petronas.[62]

Under the contract, the three corporations will develop the South Pars oil field in the Persian Gulf south of Iran.[63] The deal is the largest between Iran and a European country since the 1979 revolution.[64]

The United States immediately called for sanctions under the Act.[65] The French government, however, defended the deal under its policy of open dialogue with Iran, and criticized the Act's extraterritorial provisions.[66] Further, another French petroleum company, Elf Aquitaine SA,

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57. *EU Oil Fears Over US Sanctions Law*, FIN. TIMES, Aug. 7, 1996, at 4, *available in* 1996 WL 10605967.

58. Bhushan Bahree & Brian Coleman, *ENI Signed Deal with Libya in June on Gas Resources*, WALL ST. J. EUR., Nov. 5, 1996, *available in* 1996 WL-WSJE 10753697. *See also* Robert Graham, *Italy Keen on Warmer Ties With Outcast Regimes*, FIN. TIMES, Jan. 9, 1997 *available in* 1997 WL 3765292.

59. Mark Atkinson, *UK Business Risks US Ire by Getting Cosy With Tehran*, THE OBSERVER (UK), Nov. 17, 1996, *available in* 1996 WL 12397847.

60. *EU Oil Fears Over US Sanctions Law*, *supra* note 57.

61. Gerard Baker, Guy de Jonquie'res, and David Owen, *US Condemns Total's $2bn Iran Deal*, FIN. TIMES, Sept. 30, 1997, at 1.

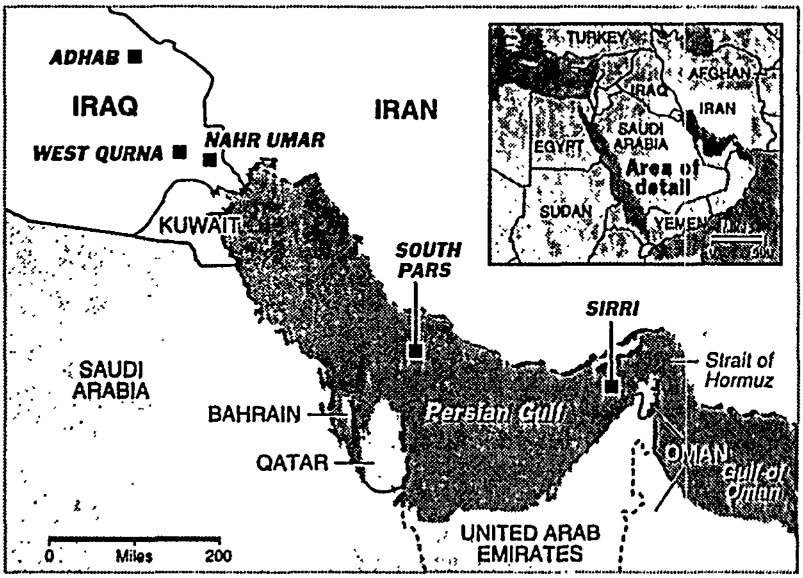
62. *Id.*

63. Paul Webster, *US Threatens Trade War Over Oil Deal*, THE GUARDIAN (UK), Sept. 30, 1997, at 13.

64. *Id.*

65. *Id.*

66. Roger Cohen, *France Scoffs at U.S. Protest Over Iran Deal*, N.Y. TIMES, Sept.



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announced in October 1997 that it would also seek oil contracts with Iran.[67] After a week of heated rhetoric, the State Department announced that it would delay imposing sanctions while the United States sought a further agreement with the European Union to avert a trade war over the Total contract.[68] U.S. and French officials met to discuss the issue, and although neither Total nor the United States backed down, no sanctions were imposed.[69]

3. *Further Negotiations with the European Union*

The controversy over the Total contract erupted just weeks before the April 1997 EU Agreement's six month cooling off period was to expire. The two sides agreed to conduct a series of meetings in October 1997[70] and to continue negotiations rather than go before the WTO.[71] Although the

30, 1997, at A1.

67. *Elf Aquitaine Exploring Iran and Iraq Deals*, WALL ST. J. EUR., Oct. 2, 1997, at 9.

68. Laurie Lande, *U.S.: No Decision Yet on Punishing Total for Iran Deal*, DOW JONES NEWS SERV., Oct. 5, 1997.

69. Craig R. Whitney, *Cohen Declares Iran Deal Won't Hurt Ties to France*, N.Y. TIMES, Oct. 7, 1997, at A6.

70. Julie Wolf, *EU, US Will Continue Trade Talks*, WALL ST. J., Oct. 7, 1997, at A19.

71. Agence France-Presse, *Europe, US Extend Talks on Laws Against Iran, Cuba,*

two parties failed to reach a second legal agreement, the EU and the United States signaled "good faith" toward one another over the Act and the Helms-Burton legislation.[72]

B. Russia

Russia also ignored the Act's threatened sanctions. Along with Petronas and Total, the Russian corporation Gazprom joined in the oil development deal with Iran.[73] President Yeltsin responded to the threat of U.S. sanctions under the Act by asserting, "Russia, France, and Iran are all independent freedom-loving states and it is impermissible for others to interfere and dictate which documents we can sign . . . ."[74]

Making matters more difficult for the United States, Gazprom entered the deal soon before it was to make a one-billion-dollar bond offering in world markets.[75] Gazprom is one of Russia's largest corporations, and the offering was therefore important to the U.S. effort to stabilize the Russian economy.[76] Nonetheless, Senator D'Amato called for a congressional hearing on the bond offering,[77] and requested that the U.S. Export-Import Bank decline to provide export credits to the company.[78] Under the threat of sanctions, Gazprom suspended its bond offering on November 11, 1997.[79] A month later, however, the company simply canceled its agree-

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and Libya, Oct. 15, 1997, *available in* 1997 WL 13414263.

72. Barry James, *EU and U.S. Step Back in Clash on Sanctions*, INT'L HERALD TRIB., Oct. 16, 1997, at 1.

73. John Thornhill, David Owen, and Guy de Jonqui'res, *Yeltsin Hits at US Threat on Iran*, FIN. TIMES, Oct. 2, 1997, at 5.

74. *Id.*

75. David E. Sanger, *U.S. Sanctions May Backfire on Russian-Iranian Oil Deal*, N.Y. TIMES, Oct. 16, 1997, at A1.

76. *Id.*

77. At the October 30, 1997 hearing, a number of officials and senators criticized Gazprom's actions and discussed the possibility of sanctions. William Ramsey, a Deputy Assistant Secretary of State, gave a summary of the investigations into the dealings of several foreign corporations. *See generally Iran Libya Sanctions Act, Hearing Before the Subcomm. on Energy, Sanctions, and Commodities of the Senate Comm. on Banking*, 105th Cong. (1997).

78. Robert S. Greenberger and Laurie Lande, *Russia's Gazprom Appears Vulnerable to U.S. Pressure over Iranian Oil Deal*, WALL ST. J., Oct. 17, 1997, at A4; Laurie Lande, *Ex-Im Bank is Expected to Yank Funds For Oil-Service Firms Tied to Gazprom*, WALL ST. J., Oct. 28, 1997, at A10.

79. Steven Erlanger, *Russian Partner in Iran Deal Postpones Its Bond Offering*, N.Y. TIMES, Nov. 12, 1997, at A10.

ment with the Export-Import Bank[80] and appears to be going ahead with its plan for the Iranian development.

C. Malaysia

The Malaysian national oil company Petronas signed a major investment deal for Iranian oil development in October 1996, saying that "[w]e will not submit to U.S. dictation," and that "[t]he U.S. has no right to impose extra-territorial jurisdiction on other countries."[81] As a partner with Total and Gazprom, Petronas raised the ire of the United States when the three corporations announced that the deal would proceed.

In October 1997, the United States announced that it was sending legal investigators to France, Russia, and Malaysia to look into the contract.[82] The Malaysian government, however, told the United States that it would not be permitted to investigate Petronas for violation of the Act.[83] A group of Malaysian government officials fired off a defiant letter to the U.S. Congress over the threat of sanctions,[84] and the prime minister announced that the project would go forward.[85] As with France, U.S. officials met with Malaysian leaders,[86] and no sanctions were immediately imposed.

D. Other American Trading Partners

A number of other states have continued to invest in either Iran or Libya since the Act's passage. The Ukraine agreed to make several weapons sales to Libya,[87] and in November 1996 Libya agreed to a deal with

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80. Michael R. Gordon, *Defying Pressure Over Iran Deal, Russians Spurn U.S. Loan Pact*, N.Y. TIMES, Dec. 18, 1997, at A5.

81. James Kynge, *Malaysia Angered by US Sanctions Threat*, FIN. TIMES, Nov. 1, 1996, *available in* 1996 WL 13945441.

82. *U.S. Experts Dispatched*, N.Y. TIMES, Oct. 7, 1997, at A6.

83. Wendy Lim, *Gov't Won't Allow U.S. Probe*, BUS. TIMES (MALAYSIA), Nov. 13, 1997, at 1, *available in* 1997 WL 13787936. *See also* Agence France-Presse, *Malaysian Activists, Lawyers Back Refusal to Yield to US Probe*, Nov. 14, 1997, *available in* 1997 WL 13433926.

84. Ramlan Said, Sarban Singh, and Meilani Radzi, *State Leaders Denounce US Congressmen's Move*, NEW STRAITS TIMES (MALAYSIA), Nov. 14, 1997, at 1, *available in* 1997 WL 15074441.

85. Ahmad A. Talib, *KL, Paris to Go Ahead With Project*, BUS. TIMES (MALAYSIA), Nov. 18, 1997, at 1, *available in* 1997 WL 13788118.

86. *US Envoy Arrives in Malaysia for Petronas Talks*, ASIA PULSE, Nov. 19, 1997, *available in* 1997 WL 13572172.

87. Boris Vinogradov, *Ukraine Skids to "SCUDS"*, RUSSIAN PRESS DIGEST, Dec. 11, 1996, *available in* 1996 WL 14082401.

neighboring Tunisia to build a pipeline for oil exports.[88] Turkey's then-Islamic-oriented government signed a twenty-three billion dollar natural gas export deal with Iran in August 1996,[89] and two months later agreed to triple trade with Libya.[90] Turkey denied that its Iranian deal violated the Act, saying that it constituted a "trade agreement" rather than an investment.[91]

In November 1997, Total SA and corporations from Spain, Norway, and Austria signed a deal with Libya to commence oil exploration in the Murzuk Basin.[92] In the wake of the Total deal with Iran, moreover, the U.S. government also began an investigation into whether a 180-million-dollar oil development deal between Iran and companies from Canada and Indonesia violates the Act.[93] As with several other states, the United States sent investigators to Canada to look into the deal.[94]

E. Iran and Libya

Libya and Iran reacted to the Act with considerable rhetoric, no doubt emboldened by the number of nations ignoring the threat of sanctions. Iran filed a new case with the Iran-U.S. Claims Tribunal at The Hague, claiming that the Act violates U.S. statements in the Algiers Accords that it will not intervene in Iranian affairs, even indirectly.[95] Libya led a United Nations resolution in the General Assembly calling for the end of unilateral sanctions which passed, fifty-six to four, but seventy-six states, including those of the EU, abstained.[96] Iran has used recent trade successes to claim that the Act has had no effect; for example, it announced in February 1997

88. Agence France-Presse, *Libya Strikes Gas Export Deal with Tunisia*, Dec. 2, 1996, *available in* 1996 WL 12192096.

89. Thomas Lippman, *U.S. Decries Turkey's Gas Deal With Tehran*, WASH. POST, Aug. 13, 1996, at A1, *available in* 1996 WL 10725993.

90. *U.S. Criticizes Turkish Leader for Libya Trip and Trade Deal*, N.Y. TIMES, Oct. 8, 1996, at A6.

91. *Tehran Sets Iran Gas Deal, Says It Doesn't Defy Ban*, WALL. ST. J., Aug. 12, 1996, at A7, *available in* 1996 WL-WSJ 3114084.

92. *Repsol Signs Up Libya*, OIL DAILY, Nov. 4, 1997, at 7, *available in* 1997 WL 8667628.

93. Steven Erlanger, *Crumbling Walls: U.S. Effort to Isolate Both Iran and Iraq is Fraying Badly*, N.Y. TIMES, Nov. 11, 1997, at A6.

94. Reuters, *U.S. Presses Bow Valley Sanctions Threat in Ottowa*, FIN. POST (CANADA), Nov. 8, 1997, at 7, *available in* 1997 WL 14959655.

95. *Iran Files New Case With Iran-U.S. Claims Tribunal*, MEALEY'S INT'L ARB. REP., Aug., 1996, at 23, *available in* WL at 11 No. 8 MINTARBR 23.

96. Agence France-Presse, *General Assembly Calls for End to Unilateral Sanctions*, Nov. 18, 1996, *available in* 1996 WL 12189940.

that European and Japanese banks were continuing to grant billions in loan guarantees despite the threat of sanctions.[97] After planning an increased national budget for 1997, Iran claimed that the American laws against domestic and foreign investment had "failed"[98] and, pointing out that U.S. businesses had been hurt, scoffed, "Conoco out, Total in."[99]

Given the number of foreign corporations openly defying the Act, one may wonder if the United States has been successful in past efforts at extraterritorial application of foreign-policy-based trade controls. Section IV outlines several such past attempts. Section V discusses the legal grounds for and objections to extraterritorial application of American law.

III. The Outer Bounds of American Extraterritoriality-*Fruehauf*, the Soviet Pipeline, and Helms-Burton

The Iran and Libya Sanctions Act represents but the latest in a long line of efforts by the United States at extraterritorial legislation for foreign policy objectives. Since the end of World War Two, Congress or the President has attempted to restrict the trade or investment of foreign subsidiaries of American corporations or foreign corporations dealing in expropriated American property in relation to actions by communist regimes, white minority rule in Africa, and other policy issues. Few, however, have been successful and most have been quickly withdrawn. Moreover, none was as direct as the Act in attempting to restrict trade by wholly foreign businesses not affecting American property interests.

A. The Freuhauf *Case*

The earliest major attempt by the United States to enforce extraterritorial trade restrictions against companies on foreign soil was the so-called *Fruehauf* case, which stemmed from hostilities with China during the Korean War.[100] During the war, the United States issued regulations prohibiting American trade with China or North Korea under the Trading With

97. Alan Friedman, *Europe and Japan are Guaranteeing $5 Billion in Loans to Tehran*, INT'L HERALD TRIB., Feb. 3, 1997, at 1, *available in* 1997 WL 4489484.

98. Agence France-Presse, *Iran's New Budget Not Affected by US Sanctions: Rafsanjani*, Nov. 24, 1996, *available in* 1996 WL 12187595.

99. *Iran Official Says U.S. Business Hurt Most by Sanctions*, DOW JONES INT'L NEWS, Nov. 19, 1996, *available in* WL Database EURONEWS.

100. Robert B. Thompson, *United States Jurisdiction over Foreign Subsidiaries: Corporate and International Law Aspects*, 15 LAW & POL'Y INT'L BUS. 319, 327 (1983).

the Enemy Act.[101] The prohibitions continued after the war, while U.S. allies Canada and France continued to trade with China.[102] Complaints by the Canadian government followed an American attempt to prevent the Ford Motor Company's subsidiary in Canada from trading with China, and the United States apparently backed down.[103]

Conflicts over another U.S. overseas subsidiary's trade with China in automotive equipment, however, led to a legal dispute between the United States and France.[104] The Fruehauf corporation was incorporated in France, but an American company owned a majority of its stock and constituted a majority on its corporate board.[105] On that basis, the Treasury Department sought to force the company to break off its business dealings with China.[106] The three French citizens on Fruehauf's corporate board then asked a French court to take over the business and continue its Chinese sales contract.[107] The court agreed,[108] and in 1965 the French appeals court upheld the decision, citing the needs of the company's employees over the "personal interests" of the American directors.[109] The United States made no further effort to enforce its law, and *Fruehauf* remains one of the few cases of American foreign-policy-based extraterritorial enforcement to come before a court.

B. The 1970s: Rhodesia, The Arab Boycott, and Iran

On three occasions in the 1970s, the United States applied extraterritorial sanctions in a limited context. For example, as part of the multinational effort against white minority rule in Rhodesia in the 1960s, the United States imposed trade sanctions that included foreign subsidiaries of

101. Trading With the Enemy Act of 1917, 50 App. U.S.C.A. § 10; Fed. Reg. 2503-04 (1942) defined its reach to businesses controlled by those under U.S. jurisdiction.

102. Thompson, *supra* note 100, at 327.

103. *Id.*

104. William Laurence Craig, *Application of the Trading With the Enemy Act to Foreign Corporations Owned by Americans: Reflections on* Fruehauf v. Massardy, 83 HARV. L. REV. 579, 580 (1970).

105. *Id.*

106. *Id.*

107. Thompson, *supra* note 100, at 327-28.

108. *Id.* at 328.

109. As translated in Craig, *supra* note 104, at 580-81. *See* Fruehauf Corp. v. Massardy, [1968] D.S. Jur. 147, [1965] J.C.P. II 14274 bis [1965] Gaz. Pal. 86. For a full translation of the appeal, *see* ANDREAS F. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS 83 (1977).

American businesses located in that country.[110] In 1977, Congress acted to prevent American firms and their foreign subsidiaries from complying with the Arab states' boycott of Israel,[111] and in 1979 ordered a freezing of all Iranian assets during the hostage crisis, including again those held by foreign subsidiaries of U.S. firms.[112]

C. *The Soviet Pipeline*

The second major effort by the United States at extraterritorial enforcement of trade laws for foreign policy objectives came in the early years of the Reagan administration. In response to the 1982 Soviet crackdown on the Polish labor union Solidarity, President Reagan acted to prevent oil and gas related exports to the U.S.S.R. under the Export Administration Act of 1979 to prevent the construction of an oil pipeline.[113] That statute allowed the President to restrict trade by any person subject to U.S. jurisdiction.[114] As in the *Fruehauf* case, the United States sought to prevent foreign subsidiaries of American companies from engaging in such trade and went further by attempting to restrict wholly foreign corporations from exporting goods manufactured with U.S. technologies under license from American businesses.[115]

Numerous European countries with Soviet sales contracts (as well as the European Community) protested against the trade restrictions, claiming that the extraterritorial application was a violation of their sovereignty and therefore of international law.[116] Both the British and French governments ordered their firms to continue business with the Soviets.[117] The Reagan administration initially responded by placing European countries whose businesses were still trading with the U.S.S.R. and fell under the Export

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110. Thompson, *supra* note 100, at 334; LOWENFELD, *supra* note 109, at 296-97. In 1972, however, the United States obviated its participation in the global effort through the Byrd Amendment, which permitted trade in certain materials. *Id.* at 298-99.

111. Thompson, *supra* note 100, at 341-42.

112. *Id.* at 347-48.

113. Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983).

114. Export Administration Act of 1979, 50 App. U.S.C.A. § 2406. The statute allows the President to impose export restrictions on a number of commodities.

115. Barry E. Carter, *International Economic Sanctions: Improving in the Haphazard U.S. Legal Regime*, 17 CAL. L. REV. 1159, 1194 (1987).

116. Donald Dekieffer, remarks at the American Society of International Law Proceedings, Extraterritorial Application of U.S. Export Controls—The Siberian Pipeline, (April 15, 1983), *in* 77 AM. SOC'Y INT'L L. PROC. 241, 244 (1983).

117. *Id.*

Administration Act on a temporary trade blacklist.[118] Two French firms were forbidden from doing any business in the United States,[119] and one, Dresser, sued in U.S. court for an injunction against the sanctions.[120] The District Court for the District of Columbia denied an injunction, holding that such relief would harm U.S. foreign policy goals: "... the United States has a grave interest in its ability to enforce these regulations which are, in its view, essential to the accomplishment of important foreign policy objectives."[121] The controversy subsided, however, as Reagan soon ended his efforts at extraterritorial enforcement under domestic and international pressure.[122]

D. *The Helms Burton Legislation*

The United States refrained from using extraterritorial legislation to enforce foreign policy for over a decade. In 1996, however, President Clinton signed the Helms-Burton legislation, which provided for sanctions against foreign firms "trafficking" in property expropriated by the Cuban government from American firms or Cuban-Americans. The statute created friction between the United States and its trading partners not seen since the Soviet pipeline case.[123] Passed just months before the Act, the ongoing Helms-Burton controversy has overshadowed the latter statute since its passage, perhaps because Cuba is not an international pariah like Libya or Iran.

Like the Act, Helms-Burton seeks to deter certain investments in Cuba by wholly foreign corporations;[124] it proscribes dealings in property expropriated by the Cuban revolutionaries from Americans and then-Cuban nationals.[125] Like the Act, Helms-Burton has engendered angry opposition from American trading partners in Europe and elsewhere, leading to the "clawback" regulation described above[126] as well as the complaint

118. *Id.*

119. Note, 81 MICH. L. REV. at 1310 n.17.

120. Monroe Leigh, *Judicial Decision—Export Administration Act—Extraterritorial Jurisdiction Over Foreign Incorporated Subsidiaries of U.S. Parent Companies Upheld in United States Court*, 77 AM. J. INT'L L. 626 (1983).

121. *See* Dresser Indus., Inc. v. Baldridge, 549 F. Supp. 108, 110 (1982).

122. Carter, *supra* note 115, at 1195.

123. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. Law No. 104-114, 110 Stat. 785 (March 12, 1996) (codified at 22 U.S.C. § 6021-91).

124. *Id.* at Title III, § 302.

125. *Id.*; *see also* § 4 (definition of "confiscated" property).

126. *See* Langeheime address, *supra* note 52.

before the World Trade Organization.[127] Moreover, the statute has yet to be acted upon;[128] like the Act, it may have been more election-year posturing than actual trade strategy.[129]

E. How the Iran-Libya Sanctions Act Differs

Whether past efforts at extraterritorial legislation were limited to trade with particular states or affected trade in several countries, the Act stands apart in sanctioning the behavior of wholly foreign corporations with no ties to American business or property. Even the Helms-Burton legislation involves American property expropriated after the Cuban Revolution. Given the lack of success by the United States in its three previous extraterritorial efforts, the Act's viability seems unlikely under an examination of standards of both general customary international law and the General Agreement on Tariffs and Trade.

IV. The Act's Viability Under General Customary International Law

Extraterritorial legislation, or the attempt by a government to subject those beyond its borders to the jurisdiction of its laws, is a highly controversial area of international jurisprudence. To what extent may a state seek to enforce its foreign policy objectives on those in other states? What is the role of state sovereignty in extraterritorial questions, especially where the subject of enforcement is not a national of the state claiming jurisdiction? Under what circumstances do most states allow others extraterritorial jurisdiction? Despite some guidelines from the Restatement and a history of attempts at extraterritorial legislation, these questions remain largely unanswered for the Act's claimed goal of sanctioning the trading behavior of wholly foreign corporations.

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127. World Trade Organization, Permanent Delegation of the European Commission, United States—The Cuban Liberty and Democratic Solidarity Act—Request for the Establishment of Panel by the European Communities, WT/DS38/2 (Oct. 8, 1996).

128. *See* Myers, *supra* note 9.

129. Because there are many articles on Helms-Burton, I will not dwell on the issue at length; for further information *see, e.g.*, Symposium, *The Helms-Burton Act: Domestic Initiatives & Foreign Responses*, 20 HASTINGS INT'L & COMP. L. REV. 713 (1997); Jonathan R. Ratchik, Note and Comment, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343 (1996); Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419 (1996); Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent With International Law*, 90 AM. J. INT'L L. 434 (1996).

In order to apply extraterritorial legislation such as the Act, a state must have "jurisdiction to prescribe," that is, the ability "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court."[130] Under the Restatement, such jurisdiction exists for conduct or persons within its territory, activity by its nationals outside the state, and "conduct outside its territory which has or is intended to have substantial effect within its territory."[131] Because the Act seeks to proscribe conduct by foreign nationals outside the United States,[132] its legitimacy depends on the extent of the latter possibility, known as the "effects doctrine."[133] Accordingly, that doctrine's development and limits must be examined.

In the early years of the twentieth century, American courts hesitated to extend the reach of domestic statutes abroad, even where both parties were United States citizens. Calling the idea that the Sherman Act applied to American corporations operating in foreign states a "startling proposition," Justice Holmes wrote in *American Banana Co v. United Fruit Co.*, ". . . the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[134]

The "general presumption against the extraterritorial application of statutes" set forth by Holmes still exists today.[135] That presumption, however, may not apply in three cases. First, it does not apply where Congress has stated an intention that the statute have extraterritorial reach, as with the Act.[136] Second, it is inapplicable where the "failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.[137] Finally, there is no such presumption where the conduct

130. THE RESTATEMENT, § 401(1).

131. *Id.*, § 403.

132. The Act, § 5.

133. The term is from Kenneth R. Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U. L. REV. 323, 326 (1981).

134. *See* American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1909).

135. *See* Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993).

136. *See id.*; Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) (holding that Congress did not intend that the National Labor Relations Act apply extraterritorially).

137. *Id.*

causes extraterritorial effects but "occurs largely within the United States."[138]

For the exception under legislative intent, the issue is "whether language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States as sovereignty or has some measure of legislative control."[139] Here, Congress clearly intends the Act to have extraterritorial effect, as both the statute and the legislative history show a desire to sanction foreign firms investing in Iran and Libya.[140] Although it never mentioned principles of international law in committee reports on the bill, Congress implied that foreign investment in those states has an effect on the security of the United States by allowing Iranian and Libyan sponsorship of terrorism and weapons development to continue.[141] Thus, the question whether the United States has jurisdiction to such prescribe foreign investment rests on the extent and limits of the "effects doctrine."

The "effects doctrine" was promulgated soon after the *American Banana* case. Under that theory, as Justice Holmes defined it in 1911, "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."[142]

Learned Hand further refined the effects doctrine in 1945, writing:

> "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences in the United States. [citations omitted] On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[143]

In both these cases, the question was whether American businesses acting abroad caused such "effects" in the United States that they might be

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138. *Id.*

139. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949)).

140. The Act, § 5; *See generally* H. REP. NO. 104-523, Parts 1 and 2; S. REP. NO. 104-187.

141. S. REP. NO. 104-187, at 5.

142. *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911).

143. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2nd Cir. 1945).

liable under its laws.[144] Extraterritorial jurisprudence based on the "effects doctrine" in such circumstances can be controversial under international law when the acts were legal in the state in which they were carried out.[145] The Restatement calls for a two part test for the applicability of law under the "effects doctrine:" first, whether the effects were "substantial," and second, whether jurisdiction is "reasonable."[146]

Whether foreign activities have "substantial" effect within the United States to justify extraterritorial jurisdiction has often been litigated; the enunciated standards, however, do not support the Act's validity under the "effects doctrine." Under the most developed "effects" standard, that of Sherman Act cases, an "intent to affect American commerce"[147] is required for effects substantial enough to justify extraterritoriality.[148] Although American courts have not decided the issue of extraterritorial trade sanctions under the "effects doctrine," the Act would likely fail if the antitrust standard were applied. Foreign corporations trading with Iran or Libya intend no negative effect on domestic commerce; rather, they probably want continued trade with the United States as well.

Whatever the result of the "effects" test, the standard of reasonableness spelled out in section 403 of the Restatement[149] for all practical purposes bars any viable interpretation of the Act under international law. Its definition of reasonable jurisdiction to prescribe weighs eight "relevant factors," including:

> (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has a substantial, direct, and foreseeable effect upon or in the regulating state;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regu-

144. *See* Strassheim, 221 U.S. at 285; Aluminum Co. of Am., 148 F.2d at 421-23.

145. THE RESTATEMENT, § 402 cmt.d.

146. *Id.*

147. *See* Laker Airways v. Sabena, 731 F.2d 909, 924 (1984).

148. *See id.*; Timberlane Lumber v. Bank of Am., 549 F.2d 597, 615 (1976); Zenith Radio v. Matsushita Elec. Indus., 494 F. Supp. 1161, 1189 (1980).

149. THE RESTATEMENT, § 403(1).

late such activities, and the degree to which the desirability of such regulation is generally accepted;

(e) the importance of the regulation in question to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system.[150]

Again, no American court has applied these factors to a trade sanctions measure. The antitrust cases have applied similar factors,[151] and under this test the Act cannot be "reasonable." The Act proscribes conduct outside the United States[152] by foreign actors with little or no domestic effect. Although the Act's harsh stance against corporations investing in states which sponsor terrorism is certainly important to Congress,[153] the storm of opposition it has aroused among American trading partners[154] reveals its lack of general acceptance and nonconformity with traditional international law.

In addition, the Act cannot be justified under a principle of universal jurisdiction. Under that doctrine, states may act against terrorism, piracy, and other "universal offenses."[155] Clearly, foreign businesses investing in Libyan or Iranian industries are not themselves engaging in the internationally recognized felonies for which the Restatement recognizes extraterritorial universal jurisdiction.[156]

V. The Act's Viability Under the General Agreement on Tariffs and Trade

From its inception in 1947 to the Uruguay Round Agreements in 1994, the General Agreement on Tariffs and Trade has represented an attempt to liberalize world trade.[157] Under its basic Most Favored Nation trading status, states are to avoid erecting import barriers.[158] Thus, the United States has an obligation to its trading partners under GATT to pro-

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150. *Id.*, § 403(2).

151. *See* Zenith, 494 F. Supp. at 1187-88; Timberlane, 549 F.2d at 615.

152. The Act, § 5(c).

153. *See generally* H. REP. NO. 104-523, Parts 1 and 2; S. REP. NO. 104-187.

154. *See supra* Section III.

155. THE RESTATEMENT, § 404.

156. *Id.*, § 404 cmt.a.

157. JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 289-90 (3rd. ed. 1995).

158. GATT, art. I.

mote free trade. Accordingly, the Act may violate GATT unless it can be justified under that the agreement's exception for trade barriers related to national security.

The Most Favored Nation status under GATT calls for states to equalize customs duties and other import or export charges imposed on the goods of all states to which it has granted that designation.[159] It states that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[160] Currently, the United States affords Most Favored Nation status to all but a handful of nations.[161]

A second GATT limitation on trade barriers is contained in Article XI of that document. It provides:

> [n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[162]

Although some exceptions exist for control of shortages, the thrust of the Article is to limit restrictions on imports among the contracting parties to the agreement.[163]

Against these broad principles, GATT provides only narrow exceptions for restricting trade. The most prominent such provision, and that which the Act must rely for its viability, outlines a number of "national security exceptions.[164] Article XXI allows a party to GATT to take "any action which it considers necessary for the protection of its essential security interests;"[165] that language is limited to situations that involve nuclear materials, weaponry and munitions, and acts "taken in time of war or other

159. *Id.*

160. *Id.*

161. JACKSON, ET AL., *supra* note 157, at 460. Afghanistan, Azerbaijan, Cambodia, Cuba, Laos, Montenegro, North Korea, Serbia, Uzbekistan and Vietnam are denied this status.

162. GATT, art. XI § 1.

163. *Id.*; JACKSON, ET AL., *supra* note 157, at 460.

164. GATT, art. XXI.

165. *Id.*

emergency in international relations."[166] The Article further allows states to act under their United Nations Charter obligations.[167]

The meaning of "national security" and what authority defines it is unclear under Article XXI. If the European Union were to allege that the Act violates Article XI or the Most Favored Nation obligations,[168] the scope of Article XXI would have to be decided by a WTO panel. The EU might be hampered in such a claim by its acquiescence to the American claim under Article XXI in the Nicaraguan trade case from the 1980s.[169] In 1985, the Reagan administration cut off all trade with Nicaragua, claiming that the Sandinista state was a national security threat to the United States.[170] When Nicaragua brought a case before the GATT Council, Canada and many European countries supported the idea that the United States could define its own national security interest under that Article.[171] The European Community ambassador at the time also agreed with the American position.[172]

Accordingly, if the United States can define its own national security under Article XXI, the Act could be viable under GATT. The sponsorship of terrorist groups and weapons development by Iran and Libya do indeed pose a serious security threat to American interests. The Act, however, differs from the Nicaraguan case in a fundamental manner: it seeks to place trade restrictions not on Iran and Libya, but on foreign firms making investments in their key industries.[173] Thus, GATT might not permit the United States to define its national security interest where the definition involves secondary boycotts.

The EU could still bring a WTO action if sanctions were imposed.[174] Moreover, as described above, Malaysia may also bring a WTO complaint. Only then will the scope of Article XXI exceptions be decided. Given the potential application of the Act to businesses incorporated in countries posing no security threat to the United States, an extension of Article XXI encompassing the Act would swallow the rule; trade barriers could be

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166. *Id.*

167. *Id.*

168. The EU complaint against the Helms-Burton legislation, *supra* note 87, claims that that statute violates Article XI, among others.

169. JACKSON, ET AL., *supra* note 157, at 985.

170. *Id.*

171. *Id.*

172. *Id.*

173. The Act, §§ 5-6.

174. The EU reserved its right to continue its WTO claim under the April 1997 agreement. *See* EU Understanding, *supra* note 55.

erected for any number of foreign policy concerns. As the United States has always been the strongest party behind GATT and the primary advocate of liberalized global trade,[175] it would be politically unwise to apply the Act in defiance of previous norms of GATT trading obligations.

Furthermore, the Act may weaken the fledgling authority and legitimacy of the WTO[176] itself.[177] Because the United States would likely ignore an adverse WTO ruling under GATT's national security exception, the WTO would certainly lose international prestige.[178] Thus, to maintain the authority of both GATT and the WTO in international legal disputes, the United States should suspend operation of the Act to ensure the legitimacy of the only global means of resolving such conflicts.

VI. Policy Concerns Surrounding the Act's Implementation

In addition to legal concerns, the Act raises a number of political concerns. The Act may only weaken President Clinton's efforts against terrorist proxy states in the eyes of the international community, and it could lead to unintended consequences for the states formerly under Soviet dominion. Accordingly, the Act is probably politically as well as legally unsound.

Above all, the Act may serve to unduly strain U.S. relations with the European Union without any attendant curtailment of European trade with Iran and Libya. Even before President Clinton signed the Act, German leaders harshly criticized Congress for its "lack of communication . . . [with] the outside world."[179] As described above, the immediate political fallout from the Act's passage in August 1996 was a vigorous round of criticism from America's European allies. Sanctions from the United States would almost surely be met by EU sanctions, a result not in the interest of U.S. businesses that may have initially supported the legislation.[180] In fact, the United States now faces a campaign by numerous

175. Jeffrey J. Schott, *U.S. Policies Toward the GATT: Past, Present, Prospective, in* GATT AND CONFLICT MANAGEMENT: A TRANSATLANTIC STRATEGY FOR A STRONGER REGIME 23, 42 (Reinhard Rode ed., 1990).

176. For a description of the WTO's formation and purposes, *see* JACKSON, ET AL., *supra* note 157, at 301-04.

177. Buerkle, *supra* note 54.

178. *See Europe, US Extend Talks on Laws Against Iran, Cuba, and Libya, supra* note 71.

179. Rick Atkinson, *Divergent Policies Toward Iran Strain U.S.-German Relations,* WASH. POST, June 27, 1996, at A21, *available in* 1996 WL 10718274.

180. In fact, the U.S. Chamber of Commerce condemned the Act in November 1996, citing the possible harmful results for American business. Reuters, *US Sanctions Laws*

domestic corporations against the Act and similar sanctions.[181] If a purpose of the Act was to present Iran and Libya with the image of a United States tough on terrorism with the support of its trading partners, that objective failed even before the Act's passage.

Another and perhaps unanticipated possible effect of the Act lies with the newly independent states formerly under Soviet control. Oil-rich nations like Azerbaijan look toward trade with neighboring Iran as a means to remain independent of Russia; trade sanctions against such investment could push them back toward the Russian fold.[182] This concern is not abstract; in December 1997, the government of Turkmenistan entered into a twenty-five year, 190 million dollar deal with Iran for gas export pipelines, just months after ending its pipeline flow into Russia.[183] Kazakstan may also develop an export pipeline through Iran.[184] Applying sanctions under the Act against such developments would hinder American interests in promoting democracy in the region.

VII. Conclusion

The viability of the Iran and Libya Sanctions Act of 1996 is highly unlikely under considerations of general customary international law, GATT obligations, and political concerns. Its scope, well beyond those of other American attempts at extraterritorial legislation, defies all prior norms of trade sanctions. Furthermore, the Act seems to have so far accomplished little aside from angering American trade partners.

The use of extraterritorial legislation to enforce American foreign policy has always been controversial; the *Fruehauf* and Soviet pipeline cases demonstrate that it is also likely to fail when confronted with international opposition. Yet the Act seeks an unprecedented trade sanction power over wholly foreign corporations. The above cases involved foreign subsidiaries of American corporations, and even the Helms-Burton statute involves the use of expropriated American property. Here, there is no such claim; as Senator D'Amato put it so bluntly, the statute seeks to force a

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Condemned, FIN. TIMES, Nov. 14, 1996, at 7, *available in* 1996 WL 13948415; *see also* Agence France-Presse, *U.S. Corporate Sanctions on Iran, Libya Seen Opposed by U.S., EU Executives*, Nov. 6, 1997, *available in* WL Database EURONEWS.

181. Nancy Dunne, *US Companies Link to Fight Sanctions Threat*, FIN. TIMES, Feb. 6, 1997, *available in* 1997 WL 3771619.

182. Peter Rodman, *Why Ease Up on Iran?*, WASH. POST, Dec. 11, 1996 at A25.

183. Hugh Pope, *Iran Gains in Turkmen Natural-Gas Deals*, WALL ST. J., Dec. 30, 1997, at A6.

184. *Id.*

choice in trade partners among foreign corporations with the threat of sanctions.

This unprecedented extension of extraterritorial authority seems to have been only barely considered in the congressional reports issued before its passage.[185] Congressmen Hamilton and Moran's "Concerns on the Bill" attached to the first House Report alludes to the possibility that other governments may claim that the Act violates international law.[186] They treated this possibility, however, only as a policy concern, that is, that the United States might have to act alone.[187] Neither they nor the House or Senate Committees appear to have weighed the Act against standards of international law or GATT obligations.[188] Given the proximity of the timing of the Act with the loss of American contracts in Iran, it seems clear that the statute was passed to address political and economic concerns without due regard for its legal implications.

As discussed in Sections V and VI, the Act is likely beyond the purview of both general customary international law and the General Agreement on Tariffs and Trade. The Iran and Libya Sanctions Act of 1996 is an anomaly under international law. It would extend the use of extraterritorial trade sanctions to enforce American foreign policy beyond any previous point. If applied, it would set the precedent that states may use trade sanctions to affect the acts of wholly foreign business, which, if imitated, could disrupt the liberal standards of world trade. Therefore, both political and legal considerations call for the suspension of the Act before the imposition of trade sanctions against any foreign corporations.

185. *See generally* H. REP. NO. 104-523, Parts 1 and 2; S. REP. NO. 104-187.
186. H. REP. NO. 104-523, Part 1, at 20.
187. *Id.*
188. *See generally* H. REP. NO. 104-523, Parts 1 and 2; S. REP. NO. 104-187.